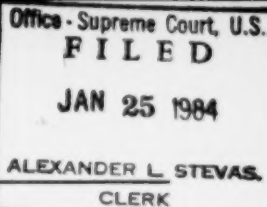


88NO.1244



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LAMAR OUTDOOR ADVERTISING, INC. ET AL.,

Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES K. CHILD, JR.
HENRY E. CHATHAM, JR.*
MARGARET HEGMAN WILLIAMS
WISE CARTER CHILD & CARAWAY
Professional Association
600 Heritage Building
Congress at Capitol
Post Office Box 651
Jackson, MS 39205
(601) 354-2385

OF COUNSEL:
JACK H. PITTMAN
PITTMAN AND HOLLIMAN
Post Office Box 2015
Hattiesburg, MS 39401

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Twenty-First Amendment's enhancement of the police power granted to states in the area of liquor regulation alters the standard of review or shifts the burden of proof otherwise applicable in determining whether a state's general ban on the advertising of liquor violates the First Amendment protection of commercial speech?

2. In the face of uncontradicted record evidence that residents of a state are inundated with liquor advertisements from magazines, newspapers and broadcasts originating from sources outside the state, can such state impose a ban on liquor advertisements in newspapers, magazines, broadcasts, and other public advertising media which originate within the state consistent with the protection of commercial speech and equal protection under the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-4076) in the United States Court of Appeals for the Fifth Circuit:

Plaintiffs-Appellees:

Lamar Outdoor Advertising, Inc.
Outdoor Communications, Inc.
Crawford Advertising of Mississippi, Inc.
Cameron, Inc.
National Advertising Company
Classic Advertising, Inc.
Walter C. Vick d/b/a Mississippi Outdoor Advertising
Mississippi Press Register, Inc.
Natchez Newspapers, Inc.
Gulf Publishing Company, Inc.
Delta Press Publishing Company, Inc.
Grenada Newspapers, Inc.
Commonwealth Publishing Company, Inc.
Delta-Democrat Publishing Company
Bolivar Newspapers, Inc.
Capital Reporter Publishing Company, Incorporated
Crest Broadcasting Company, Incorporated
Service Broadcasters, Incorporated
Lee Broadcasting Company
Tri-Cities Broadcasting Company
E.O. Roden and Associates
WLOX Broadcasting Company
T A B Broadcasting Company
Rebel Broadcasting Company
New South Communications, Incorporated
New South Broadcasting Corporation
Fritts Broadcasting, Incorporated
Deep South Radio, Incorporated
New Laurel Radio Station, Incorporated
Television America Sixteen, Incorporated

Bob McRaney Enterprises, Incorporated
Gateway Broadcasting, Incorporated
First Natchez Corporation
Air Enterprises, Incorporated
Southeast Mississippi Broadcasting Company
Southland, Incorporated
Voice of the New South, Incorporated
P.T.C., Incorporated
WGUF, Incorporated
Haddox Enterprises, Incorporated
Broadcasters and Publishers, Incorporated
WGUD Stereo, Incorporated
Central Television, Incorporated
Communications Improvements, Incorporated
Gulf Coast Broadcasting Company
Radio Hattiesburg, Incorporated
Charisma Broadcasting Company
Broadcast Associates, Incorporated
Southern Electronics Company, Incorporated
Tung Broadcasting Company
Town and Country Broadcasting Company,
Incorporated
Martin Broadcasting Company
Starkville Broadcasting Company
WJDX, Incorporated
Metro Radio, Incorporated
WTWV, Incorporated

Defendants-Appellants:

Mississippi State Tax Commission,
Alcoholic Beverage Control Division
A.C. Lambert, Jr.
Robert A. Baggett
Latrell Ashley
Individually and in their capacities as
Commissioners of the Mississippi State
Tax Commission
Bill Allain
Individually and in his capacity as
Attorney General of the State of
Mississippi

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IN THE
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NO. _____

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v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners respectfully petition for
a writ of certiorari to the United States
Court of Appeals for the Fifth Circuit to
review that court's judgment of October 31,
1983, in Lamar Outdoor Advertising, Inc.
v. Mississippi State Tax Commission, No.

82-4076, which was decided together with Dunagin v. City of Oxford, No. 80-3762, in a single opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, on rehearing en banc, which upheld the ban on liquor advertising is reported at 718 F.2d 738 and appears as Appendix A to this petition. The panel opinion of the United States Court of Appeals for the Fifth Circuit which held that the ban on liquor advertising was unconstitutional is reported at 701 F.2d 314 and appears as Appendix B to this petition. The opinion of the United States District Court for the Southern District of Mississippi which found the ban on advertising unconstitutional is reported at 539 F.Supp. 817 and is attached as Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals, on rehearing en banc, was entered on October 31, 1983 and is attached as Appendix E. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES,
AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Miss. Code Ann. §§ 67-1-3, -7, -19, -37(e), -85 and -87 (1972); Miss. Code Ann. § 97-31-1 (1972); Regulations No. 1, 6 and 36 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These provisions are set forth in Appendix F to this petition.

STATEMENT OF THE CASE

The 56 petitioners, who consist of outdoor advertisers and print and elec-

tronic media, filed this action in the United States District Court for the Southern District of Mississippi, Jackson Division, on November 1, 1978. This action was filed in order to challenge certain statutes and regulations which prohibit advertisements of alcoholic beverages in Mississippi which originate within the state on the basis that such statutes and regulations constitute an abridgement of commercial free speech and a denial of equal protection under the law in violation of the First and Fourteenth Amendments. The Mississippi laws and regulations are necessarily material to a consideration of the questions presented by this petition. However, in order to avoid duplication, the thorough descriptions of the relevant Mississippi laws which are set forth on pages 3a through 11a of Appendix A (the en banc opinion) and at pages 77a through 89a of Appendix B to this petition (the panel opinion) are

incorporated by reference in this statement of the case. Petitioners sought a declaratory judgment that the challenged statutes and regulations were unconstitutional and a prohibitory injunction enjoining the respondents from attempting to enforce them.

Federal jurisdiction was invoked under 28 U.S.C. §§ 2201, 2202, 1331 and 1343 and 42 U.S.C. § 1983.

In 1979 both petitioners and respondents moved for summary judgment. Both motions were denied. The case was then tried before the district court, sitting without a jury, on March 11-12, 1981. The opinion of the district court, which appears as Appendix D to this petition, sets forth the district court's findings that Mississippi's ban on liquor advertising within the state violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, since the ban "in no way rationally furthers the state's

interest" in promoting temperance. 539

F.Supp. 830-31, App. C at 221a.

The respondents appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, the case was consolidated with the case of Dunagin v. City of Oxford.¹ A panel of the court heard the consolidated appeal and decided that the challenged laws and regulations were an unconstitutional restrictions of commercial speech but did not resolve the issue of whether the restriction also violated the Equal Protection Clause.²

Before delivery of the panel opinion, the Tenth Circuit issued a conflicting

¹489 F. Supp. 763 (N.D. Miss. 1980) (District Court upheld advertising restrictions on motion for summary judgment, but no equal protection claims were involved).

²701 F.2d at 334 n. 29, App. B at 158a, n. 29.

opinion³ upholding an Oklahoma law which was similar to the Mississippi law challenged in this case. Pursuant to the rules of the Fifth Circuit governing the issuance of opinions in conflict with a decision of another circuit, a rehearing en banc was ordered, and the panel opinion was vacated.*

The en banc court concluded that the Mississippi regulatory scheme violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment and reversed the judgment of the district court. In ruling on the First Amendment claims, the court of appeals interpreted California v. LaRue, 409 U.S. 109 (1972), New York State Liquor Authority v.

³Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub. nom, Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983).

*718 F.2d at 315 n. 2, App. A at 3a n.2.

Bellanca, 452 U.S. 714 (1981), and Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed ____ U.S. ____, 103 S.Ct. 31 (1982) as requiring an "added presumption in favor of validity" for the state's prohibition on liquor advertisements despite the trial court's determination that the advertising ban "does no good" and did not further the state's interest in temperance. 718 F.2d at 750, App. A at 47-48a. Rather than applying the commercial speech standard of review as set forth in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) and requiring the state to bear the burden of proof in accordance with such standard as is mandated by Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875, 2882 n. 20 (1983), the Fifth Circuit found that the Twenty-first Amendment requires the application of a rational basis scrutiny of the Mis-

Mississippi advertising ban and required the burden of proving that the ban was not a reasonable and properly restricted means of achieving Mississippi's goal of temperance to be shifted to petitioners. See 718 F.2d at 745, App. A at 26-27a.

In ruling on petitioners' equal protection claim, the en banc court of appeals ruled that since "the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener," rather than the advertiser, "there is no classification upon which the [petitioners] can assert a meaningful equal protection claim." 718 F.2d at 752, App. A at 57-58a.

REASON FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS DECIDED
AN IMPORTANT QUESTION OF
FEDERAL CONSTITUTIONAL LAW
IN CONFLICT WITH DECISIONS
OF THIS COURT BY FINDING
THAT THE TWENTY-FIRST
AMENDMENT OPERATES SO AS
TO ALTER THE STANDARD OF
REVIEW AND SHIFT THE BURDEN
OF PROOF WHICH WOULD OTHER-
WISE APPLY TO COMMERCIAL
SPEECH RESTRICTIONS

This case presents important issues concerning the effect of the Twenty-first Amendment on the allowable scope and customary standard of review of restrictions on commercial speech. If the proper standard of review for restrictions on truthful advertising of legally available products⁵ had merely been misapplied, then the

⁵Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566-67 (1980) (regulation must directly advance a substantial governmental interest and must not be more extensive than necessary to serve that interest).

error committed by the Fifth Circuit in upholding, as constitutional, Mississippi's ban on liquor advertisements might not merit this Court's attention. However, the manner in which the Fifth Circuit has interpreted LaRue and Bellanca as authority from this Court that the Twenty-first Amendment alters the standard of review and shifts the burden of proof which would otherwise be appropriate if the advertising restrictions did not involve advertisements of liquor⁶ will have far reaching and harmful effects in eroding the constitutional protection of the free flow of commercial information, if not corrected by this Court.

⁶718 F.2d 745, App. A at 26-27a. (Court of appeals distinguishes Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) and Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983) from New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) and California v. LaRue, 409 U.S. 109 (1972).

Although the court of appeals noted the persuasive line of cases⁷ in which this Court has repeatedly refused to dilute its otherwise appropriate standard of review for laws restricting individual rights whenever liquor may be involved, no attempt was made to reconcile this line of cases with the conflicting opinion of the en banc court or to distinguish this line of cases from LaRue and Bellanca. By contrast, the earlier panel opinion of the Fifth Circuit, which found the Mississippi advertising ban to be unconstitutional, distinguishes the restrictions upheld in LaRue and Bellanca as limited time, place and manner restrictions "directed at the

⁷718 F.2d at 744, App. A at 21-11a, citing, Larkin v. Grendel's Den, Inc., 459 U.S. 116, (1982), California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), Craig v. Boren, 429 U.S. 190 (1976), Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Department of Revenue v. James B. Bean Distilling Company, 377 U.S. 341 (1964).

dispensation of liquor" which only incidentally burden expression from those restrictions which are incidentally related to liquor regulation while in direct conflict with constitutional guarantees, such as the Mississippi regulations which "are directly aimed at . . . [and] impose a virtually absolute ban upon [petitioner's] expression." 701 F.2d 327-30. App. B at 124-127a.

Some of the harmful consequences of the Fifth Circuit's opinion may be addressed by this Court in deciding Capital Cities Cable, Inc. v. Crisp^{*}. However, even though both the Tenth Circuit in deciding Crisp^{*} and the Fifth Circuit in

^{*}No. 82-1795. cert. granted, 103 S.Ct. 66 (1983) (oral argument set for February 21, 1984).

^{*}Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub nom, Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983).

this case departed from the Central Hudson standard of review by applying a rational basis standard of review, the Fifth Circuit opinion has gone much further than the Tenth Circuit opinion by shifting the burden of proof to the petitioners in conflict with Bolger v. Youngs Drug Products Corp.¹⁰ Further, unlike the situation in Crisp, where the Tenth Circuit was reviewing the lower court's ruling on a motion for summary judgment,¹¹ the Fifth Circuit in this case refused to accept the findings reached by the district court after two days of trial in which the trial judge heard testimony from experts on the issue of whether the ban on advertisements advanced the state's interest in temperance.¹² Despite

¹⁰103 S.Ct. 2875, 2882 n. 20 (1983).

¹¹699 F.2d at 493 (10th Cir. 1983).

¹²718 F.2d at 748 n. 8, App. A at 39a, n. 8 (the en banc opinion states that
(Footnote continued)

the trial court's finding of fact that "residents of Mississippi are literally inundated with liquor advertisements from sources originating outside the state,"¹³ the Fifth Circuit ignored the reasoning of this Court in Bolger¹⁴ and found that if the consumers in Mississippi were indeed receiving liquor advertisements from

(Footnote continued)

the district court was in error in reaching a judicial determination of the issue of direct advancement on the basis that this is primarily a legislative determination which if "not binding . . . at least . . . carries great weight.").

¹³539 F.Supp. at 830. App. D at 219a.

¹⁴In determining that the prohibition on mailing unsolicited advertisements for contraceptives did not directly advance the government's interest in aiding parents' efforts to inform their children of birth control methods, this Court explained that such a law could provide "only the most limited incremental support for the interest asserted" where "parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects." 103 S.Ct. 2875, 77 L.Ed.2d 469, 481 (1983).

sources other than the petitioners, then "the values behind the commercial speech doctrine would not be very much threatened," since the doctrine was enacted primarily to protect consumers rather than advertisers.¹⁵ This reasoning, not only confuses the interests of manufacturers and sellers of liquor with the interests of the petitioners, who include outdoor advertising and other media businesses that operate in Mississippi,¹⁶ but severely diminishes the commercial free speech

¹⁵718 F.2d 750-51, App. A at 49a. The en banc opinion also states that the fact that "the liquor industry spends a billion dollars a year on advertising" and the fact that the petitioners have pursued their case so vigorously constitute sufficient evidence for the court of appeals to reverse the trial court, regardless of factual findings made by the lower court. 718 F.2d at 750, App. A at 47-48a.

¹⁶In Bigelow v. Virginia, 421 U.S. 808, 828 (1975), this Court recognized that advertising prohibitions against publishers, rather than advertisers, incur "more serious First Amendment overtones."

protection granted to speakers, as well as listeners.

II.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE STANDING OF MEDIA BUSINESSES TO CHALLENGE RESTRICTIONS ON COMMERCIAL SPEECH ON EQUAL PROTECTION GROUNDS IN CONFLICT WITH THE REASONING OF OPINIONS OF THIS COURT AND IN SUCH A MANNER THAT THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY AND PROTECT THE INTERESTS OF SPEAKERS OR ADVERTISERS IN THE FREE FLOW OF COMMERCIAL INFORMATION

This case is also important in that it is the first case¹⁷ to come before this Court involving the issue of whether the right to convey nondeceptive commercial information concerning a lawful product is a fundamental right subject to a strict

¹⁷In Friedman v. Rogers, 440 U.S. 1 (1979) this Court specifically found that the challenged regulation was permissible in that the speech being regulated was deceptive and misleading so as not to be within the constitutional protection extended to commercial speech.

scrutiny review for equal protection purposes.¹⁸ Although acknowledging that Mississippi law applies its ban on advertising unequally as between media whose advertisements originate outside the state from those whose ads originate within the state, the Fifth Circuit has stated that "this fact raises no First Amendment concerns . . . and gives rise to an equal protec-

¹⁸The challenged Mississippi laws and regulations apply the ban on liquor advertising unequally to similarly situated groups by creating artificial, arbitrary distinctions between media advertisers who publish or transmit liquor advertisements into Mississippi from locations outside Mississippi and media advertisers who publish or transmit liquor advertisements from within Mississippi. As noted in the panel opinion, Mississippi interprets its regulations so that the advertising ban applies only when the place of publication and/or dissemination of the advertisements is within the state of Mississippi, so that the ban on liquor advertising would not be violated where advertisements were actually printed in Mississippi, shipped to another state, and mailed for distribution from the other state. 701 F.2d at 318. App. B at 86-87a.

tion issue requiring only minimal scrutiny." 718 F.2d at 753, App. A at 58a.

Despite that the strict scrutiny test, rather than the rational-basis standard of review, has been consistently applied to equal protection claims where legislation infringes upon right of freedom of speech,¹⁹ the Fifth Circuit has ruled that neither strict nor intermediate scrutiny of legislative classifications involving First Amendment rights will be applied unless the court first finds that the challenged law also violates the First Amendment.²⁰ The en banc opinion, thus, rejects the premise that once liquor advertising is determined to be entitled to First

¹⁹Police Department of Chicago v. Mosely, 408 U.S. 92 (1972); Stanley v. Georgia, 394 U.S. 557, 549 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Buttons, 371 U.S. 415 (1963).

²⁰718 F.2d at 752, App. A at 55a.

Amendment protection by concerning "lawful activity" and by not being "misleading,"²¹ the right to transmit such commercial information is "a fundamental right" which automatically triggers strict equal protection scrutiny of any legislative classifications of advertising in that the right to transmit such information is a right "guaranteed by the Constitution" within the meaning of San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).

In Central Hudson, this Court characterized commercial speech as "expression related solely to the economic interest of the speaker and its audience" and explained that "commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible

²¹Central Hudson, 447 U.S. at 556.

dissemination of information."²² In Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), media businesses which disseminated commercial information from the speaker (advertiser) to the consumer were implicitly recognized as having a protected right to disseminate such information and as having standing to challenge restrictions on these rights.²³ Nevertheless, in direct conflict with the principles announced by this Court, the en banc opinion of the Fifth Circuit states that petitioners cannot assert a meaningful

²²447 U.S. at 561-62, citing Friedman v. Rogers, 440 U.S. 1 (1979) Bates v. State Bar of Arizona, 433 U.S. 350 (1977); and Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (emphasis added).

²³See also Memphis Publishing Co. v. Leech, 539 F. Supp. 405, 412-13 (W.D. Tenn. 1982) (publications' and publishers' equal protection rights violated by statute which imposed warning requirement on certain publications but not on other media in which alcohol was advertised).

equal protection claim entitled to strict scrutiny, since "the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener," rather than advertisers or media interest. 718 F.2d 752, App. A, at 57-58a.

The consequences of the Fifth Circuit's refusal to recognize that speakers and their media representatives have a fundamental right to disseminate commercial information will extend to cases which do not involve liquor advertisements. Accordingly, this case is of critical importance to all advertisers and media representatives who may be treated unfairly by virtue of arbitrary legislative classifications which do not serve to promote or advance the asserted legislative goal.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review

the judgment of the United States Court of
Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES K. CHILD, JR.
HENRY E. CHATHAM, JR.*
MARGARET HEGMAN WILLIAMS
WISE CARTER CHILD & CARAWAY
Professional Association
600 Heritage Building
Congress at Capitol
Post Office Box 651
Jackson, MS 39205
(601) 354-2385

OF COUNSEL:

JACK H. PITTMAN
PITTMAN AND HOLLIMAN
Post Office Box 2015
Hattiesburg, MS 39401

DATED: January 25, 1984.

*Counsel of Record.

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